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In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

v.

CHARLIE CONDON, ATTORNEY GENERAL
FOR THE STATE OF SOUTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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As we explain in our opening brief (at 39-42), the Driver's Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), is one of several statutes enacted by Congress to address concerns raised by the dissemination of personal information. Federal statutes control the circumstances in which specified private entities such as video stores, cable television companies, and credit bureaus may disclose personal information without the consent of the individual to whom the information pertains. Other statutes govern the circumstances in which federal agencies may disclose the personal information that they gather about private individuals. In similar fashion, the DPPA addresses the particular concerns posed by the disclosure of personal information by state departments of motor vehicles (DMVs). Like the statutes that regulate disclosures by private entities and by the federal government, the DPPA is tailored to address concerns about intrusions on privacy raised by the specific type of record covered by the statute; it also permits dissemination in circumstances where Congress found an important public interest in disclosure of the information in that particular kind of record.

Respondents assert that Congress's extension of federal regulation of the dissemination of personal information to state DMV records is invalid for two principal reasons. First, they argue that the DPPA, like the statutes invalidated in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997), commandeers the States into federal service by requiring them to enact or implement a federal regulatory scheme. See Resp. Br. 12-22. Second, they urge that Congress may not impose any regulations on state entities that engage in commerce unless Congress also imposes the same regulations on private persons. See *id.* at 24-27. Neither argument has merit.

1. *The DPPA Is Within Congress's Enumerated Powers.*

As a threshold matter, as we show in our opening brief (at 21-23), there can be no doubt that the DPPA regulates activity that is subject to Congress's power under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Respondents do not argue otherwise. Respondents have therefore waived any argument that the DPPA exceeds Congress's enumerated powers, and the Court should decline to address the argument made by amicus curiae Pacific Legal Foundation (PLF) that the DPPA exceeds Congress's commerce power. See *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (declining to address an argument urged only by amicus curiae).

In any event, PLF's arguments cast no doubt on the DPPA's firm grounding in the Commerce Clause. PLF asserts without substantiation (PLF Br. 5, 6) that States charge only "administrative fees" for motor vehicle records, by which it apparently means fees that cover only the cost of supplying the information. Respondents, however, have made no such claim on behalf of the State of South Carolina. Moreover, the State of Wisconsin, which has also challenged the DPPA, has acknowledged that it has done so in part to protect the $8 million it receives each year from sales of motor vehicle record information.[1] Congress also heard testimony that New York earned $17 million in one year from individuals and businesses that used the State's computers to examine motor vehicle records. See 1994 WL

[1] See Affidavit of James S. Thiel, General Counsel, Wis. Dep't of Transp., In Support Of Motion To Realign State Defendants As Plaintiffs ¶ 8 (Dec. 8, 1997), *Division of Motor Vehicles of Wis. Dep't of Transp.* v. *Reno*, petition for cert. pending, No. 98-1818 (affidavit lodged with the Clerk). Wisconsin charges only three dollars per motor vehicle record. *Ibid.* Thus, even relatively small fees, when aggregated, can produce a substantial revenue stream for a state DMV.

212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

Moreover, Congress's regulatory power under the Commerce Clause is not limited to situations in which those subject to regulation earn a profit from the regulated activity. It is sufficient in this case that state DMVs acquire the information at issue in connection with activities (the owning and operating of motor vehicles) intimately tied to interstate commerce, that personal information in state DMV records has considerable commercial value, and that the automobile industry and national direct marketing companies rely heavily on that information in their national marketing efforts. See Gov't Br. 4-5. The DPPA thus regulates activities in or affecting interstate commerce in the plainest way.

It is also well settled that Congress may exercise its regulatory power to keep the channels of commerce free of "immoral and injurious uses." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964). Congress has done so in the DPPA by acting to ensure that commerce in personal information does not facilitate stalking, identity fraud, and invasions of privacy. The Act also plainly protects interstate commerce and the channels of commerce by ensuring that access to the Nation's highways is not conditioned upon drivers being subjected to threats to their safety and privacy.[2]

[2] Respondents and their amici attempt to cast doubt on the validity of the DPPA by arguing that the Act was intended to protect privacy and personal safety, not commerce. The DPPA does regulate the commercial use of motor vehicle information, however, in significant ways. For example, the DPPA prohibits state DMVs from disclosing personal information for use in surveys, marketing, and solicitation, unless individuals are provided an opportunity, in a clear and conspicuous manner, to block such use of information pertaining to them. See 18 U.S.C. 2721(b)(12). More fundamentally, however, this Court has repeatedly made clear that Congress may exercise its Commerce Clause power to address any legitimate goal, whether or not the particular problem being addressed is predominantly

2. *The DPPA Does Not Commandeer State Governments.*

Respondents and their amici contend that this case is controlled by *New York* and *Printz*. See Resp. Br. 12-24; National Conference of State Legislatures *et al.* (NCSL) Br. 3-24; PLF Br. 11-22. Their arguments conflate compliance with commandeering, and they ignore the fundamental distinctions between the DPPA and the statutes at issue in *New York* and *Printz*.

a. The DPPA directly regulates the practices of state entities by restricting their disclosure of information. The statute addresses the threats to privacy and safety posed by DMV disclosures made without a driver's consent. In sharp distinction, the statutes at issue in *New York* and *Printz* commanded the States to implement federal schemes that regulated private persons and that addressed problems neither created nor exacerbated by the States' own activities.

The statute at issue in *New York* required the States either to regulate the way private entities dispose of low-level radioactive waste, or to take title to that waste and assume liability for the private generators' damages. See *New York*, 505 U.S. at 153-154. Both provisions effectively required the States to adopt a regulatory solution to problems created by private conduct. As the Court explained, imposing an affirmative obligation on the States to take title to the private waste was "no different than a congressionally compelled subsidy from state governments to radioactive waste producers," and requiring the States to assume liability for the generators' damages was "indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents." *Id.* at 175. On the other

commercial in character. See, *e.g.*, *Heart of Atlanta Motel*, 379 U.S. at 256-257; *United States* v. *Darby*, 312 U.S. 100, 114-115 (1941); *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917); *Champion* v. *Ames*, 188 U.S. 321, 356 (1903).

hand, the option of "regulating pursuant to Congress' direction" presented "a simple command to state governments to implement legislation enacted by Congress." *Id.* at 175-176. The Court concluded that, "[e]ither way, the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176 (citation and internal quotation marks omitted); see also *Printz*, 521 U.S. at 926 (explaining that both options presented in *New York* "effectively requir[ed] the States either to legislate pursuant to Congress's directions, or to implement an administrative solution").[3]

Similarly, the statute at issue in *Printz* required state officials to make reasonable efforts to determine whether proposed handgun sales by private sellers to private buyers would violate federal law. See *Printz*, 521 U.S. at 903. As in *New York*, the provision was invalidated because it "dragooned" state governments into addressing problems in the private sector that were not of their own making, and to do so by implementing a federally prescribed regulatory solution to those problems. *Id.* at 928.[4]

[3] Amici NCSL *et al.* are therefore incorrect in arguing (NCSL Br. 10-11) that the Court did not understand the "take title" provision invalidated in *New York* as "requir[ing] state governments or officers to regulate the primary activities of private parties." When the Court concluded that the "take title" provision impermissibly compelled the State to enact or enforce a federal regulatory program, it plainly understood that the State would have to do more than simply take title to the radioactive waste; the State would also have to develop some legislative or administrative solution for the problems presented by the waste to which it took title. Moreover, the Court analogized the "take title" provision to a coerced subsidy of waste producers by the State. 505 U.S. at 175. Such a subsidy would be a regulation of the primary, private conduct of producing radioactive waste, as would be a compelled state assumption of the private waste producers' liabilities (*ibid.*).

[4] Respondents argue (Resp. Br. 19) that the DPPA does impermissibly commandeer the States into "regulating" private individuals, because it requires the state DMVs in some circumstances to withhold information

No such commandeering occurs when the federal government directly regulates the conduct of state entities. The Court did not suggest in *New York*, for example, that Congress may not regulate a state entity's own production and disposal of radioactive waste.[5] Nor did the Court suggest in

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that individuals request from the state DMV. Such "prohibition of access" to the requested information, respondents maintain, is tantamount to regulation of the individuals who request access. There is no support for respondents' position that direct federal regulation of state activity is transmuted into "commandeering" of the State's regulatory machinery merely because of its indirect effect on private persons, and applying respondents' position to other contexts shows that it is implausible. For example, as we have observed (Gov't Br. 44), the federal government may issue security directives to govern the operation of major airports, even if those airports happen to be owned and operated by state and local governments. Respondents have not disputed that point. But if respondents' understanding of "commandeering" were correct, then the federal government could not require that access to the tarmac and baggage handling areas at such airports be restricted to persons with valid security clearances, because such a requirement would impermissibly require state and local governments that operate the airports to "regulate" those persons barred from the sensitive areas of the airport because they did not have the necessary clearances. Respondents' argument cuts the concept of "commandeering" loose from its tether.

[5] Under our constitutional structure of federalism, Congress could conclude that the sale of certain highly dangerous products should be undertaken *only* by state entities (if at all), and not by private parties. Such a regulation would be unobjectionable under the Commerce Clause. Under respondents' theory of "commandeering," however, if Congress did confine the sale of such dangerous products to state entities, Congress would be barred by the Tenth Amendment from imposing safety regulations on the state entities permitted to make such sales. Yet respondents cannot dispute that, if both state and private entities were permitted to make such sales of dangerous products, Congress could validly make the very same safety regulations applicable to state entities (because respondents agree that "generally applicable" legislation may be applied to state entities). Thus, under respondents' reasoning, the validity of congressional regulation as applied to state activity does not depend on anything of substance in the regulation; it depends entirely on whether the regulation also applies to someone *other* than the State. That approach bears little relation to the principles of federalism that underlie the Court's decisions in *New York* and *Printz*. See also Gov't Br. 45-48.

Printz that Congress may not impose regulatory requirements on state entities that themselves engage in the sale of handguns. Such regulation of the state entities' own conduct would not commandeer state legislatures or officials into enacting or enforcing a federal scheme for the regulation of private conduct. When, as in the DPPA, Congress regulates state conduct directly, the state entities engaged in that conduct are themselves the subject of the federal regulation; Congress does not "impress" state officials "into its service," see Resp. Br. 17 (quoting *Printz*, 521 U.S. at 922), or render them agents of the federal government. The state entities regulated by the DPPA are no more called upon to enforce a federal scheme than are private parties who are subject to federal regulation.

b. Respondents protest (Resp. Br. 13-14), however, that compliance with the DPPA will entail administrative burdens. But as we explain in our opening brief (Gov't Br. 30-32), in *South Carolina* v. *Baker*, 485 U.S. 505 (1988), the Court firmly rejected the contention that a federal law directly regulating state activity would be invalid merely because the States, as a practical matter, might need to devote substantial effort to bring themselves into compliance with the federal law, including changing their legislation and administrative practices. The Court made clear that the need to take "administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Id.* at 515. That point disposes of respondents' assertions (which are decidedly overstated in any event) that compliance with

the DPPA will impose onerous administrative burdens on state DMV personnel.[6]

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[6] Respondents stress the supposedly "complicated" nature of the exceptions to the general bar on disclosure in the DPPA (Resp. Br. 5), the "laborious" process of determining whether any particular request falls within one of the exceptions (*id.* at 14), and the "considerable training" of state personnel that will be needed to make them familiar with the substantive requirements of the Act (*id.* at 7 n.8). Those complaints about the burden of coming into compliance with the Act are much exaggerated. The Act does not require that a state DMV adopt any particular mechanism for ensuring that its disclosures of personal information are consistent with the DPPA. Most of the steps necessary for compliance could probably be satisfied by the initial development of a form for use by requesters. Moreover, the DPPA permits the Attorney General to impose civil penalties on a state DMV only when the DMV has a *policy or practice* of substantial noncompliance with the Act, 18 U.S.C. 2723(b); it provides for criminal punishment only when an individual *knowingly* violates the Act's restrictions, 18 U.S.C. 2723(a); and it allows recovery under a civil damages provision only when an individual *knowingly* discloses information for a purpose not permitted under the Act, 18 U.S.C. 2724(a). Thus, despite respondents' protestations that the DPPA places state officials in peril (Resp. Br. 6-7), the DPPA does not impose strict civil or criminal liability on state officials, and sanctions are not available for mere errors in judgment as to whether particular requests for information are permissible under the Act.

Respondents have therefore fallen far short of showing that the Act's supposed burden poses any danger to the residual sovereignty of the States protected by the constitutional structure of federalism. "Even the more expansive conception of the Tenth Amendment espoused in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), recognized that only congressional action that 'operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions,' runs afoul of the authority granted by Congress." *Baker*, 485 U.S. at 529 (Rehnquist, C.J., concurring in the judgment). Not only does the DPPA not pose any threat to the States' ability to structure their integral operations; it specifically protects the States' interests in regulating driving and in determining when motor vehicle information should be used for legitimate governmental purposes, as we have observed (Gov't Br. 32-33). See also p. 17, *infra* (noting that American

In *Baker*, the Court also stressed that the statute upheld in that case, which imposed a prohibition on state conduct (the use of bearer bonds), "regulate[d] state activities"; it did not "seek to control or influence the manner in which the States regulate private parties." 485 U.S. at 514. The same is true here. The DPPA regulates the state activity of dissemination of information; it does not require the States to exercise their regulatory power over private persons. The States, for example, have no obligation to pursue remedies against any requester who improperly obtains or uses information from motor vehicle records.[7]

c. Respondents further err in arguing (Resp. Br. 20) that *New York* "explicitly recognized that Congress cannot impose duties on the States regardless of whether the duties imposed are mandatory or prohibitory in nature." That assertion is an incorrect statement of the law. *New York* did not hold that Congress may impose no "duties" on state entities; such a holding could not be squared with many of the Court's Tenth Amendment decisions, including *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528

Association of Motor Vehicle Administrators supported passage of the DPPA).

[7] Respondents argue (Resp. Br. 23) that the Court engaged in a "balancing" analysis in *Baker*, and that no such balancing of federal and state interests is appropriate in this case. We agree that balancing is not appropriate in this case, but we do not agree that *Baker* applied a balancing analysis. The Court concluded in *Baker* that the Tenth Amendment is not violated by the application of federal regulation to state activity, even though the States may, in response to that federal regulation, deem it necessary or convenient to change their legislation or administrative practices. See 485 U.S. at 515. That holding did not depend on a court's possible evaluation of the relative weights of the state and federal interests. Nor does *Baker* suggest that a court should make its own evaluation of the onerousness of the administrative burden that Congress has imposed on a state entity, to determine whether the federal regulation is consistent with constitutional principles of federalism.

(1985), which reaffirmed that Congress may impose duties on state entities—in that case, the duties to adhere to maxmium-hours legislation and to pay overtime pay when required. The Court did state in *New York*, as respondents observe (Resp. Br. 20), that, "even where Congress has the authority * * * to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." 505 U.S. at 166. The DPPA, however, does not suffer from that deficiency. The DPPA does not require state DMVs to require or prohibit anyone outside the agency to do anything.

It is particularly difficult to sustain a contention that a federal statute impermissibly commandeers state officials when (as with the DPPA) the statute under challenge imposes no affirmative obligations at all.[8] If a federal statute

[8] Respondents and amici NCSL *et al.* incorrectly argue (Resp. Br. 7; NCSL Br. 15-16) that the DPPA affirmatively requires state DMVs to make disclosures to the federal government in certain circumstances. The distinction between a permissible requirement of compliance with federal standards and impermissible commandeering does not generally turn on whether the regulation at issue imposes a restriction or an affirmative obligation on state entities. But in any event, as we explain in our opening brief (at 28 n.12), the DPPA does not create any new disclosure requirements beyond those otherwise existing under federal law. Although the DPPA provides that personal information from motor vehicle records "shall" be disclosed to carry out the purposes of other specified federal statutes, see 18 U.S.C. 2721(b) (1994 & Supp. III 1997), that provision only makes clear that the DPPA does not relieve state agencies of reporting requirements that the other federal statutes might impose. See also 1994 WL 212696 (Feb. 4, 1994) (statement of Marshall Rickert, American Association of Motor Vehicle Administrators) (urging Congress to amend the Senate version of the bill to clarify that it would not "create conflicts with other current federal privacy and disclosure requirements as they related to motor vehicle and driver records"). The DPPA therefore imposes no reporting obligations independent of those in the underlying statutes, and any consideration of the validity of such reporting obligations should await a case in which those underlying statutes are directly placed in issue. That is especially so since the affirmative reporting

"commandeers" state officials, one would assume that it does so in order that they carry out some affirmative act, such as adopting a regulatory program governing radioactive waste (as in *New York*) or performing background checks to determine the legality under federal law of proposed handgun transfers (as in *Printz*). By contrast, when a federal statute simply prevents state officials or agencies from taking action, it is difficult to see how they have been commandeered.[9]

requirements have not been the focus of contention in this case in the lower courts. Respondents' complaint alleged that the DPPA "commands the states * * * not to disclose state motor vehicle and driver's license records except as provided by [the] Federal statute," J.A. 11; it did not assert as a specific basis of invalidity that the DPPA requires the States to disclose information. Nor did respondents challenge the DPPA on that basis in the court of appeals. This case therefore presents no occasion for the Court to consider the validity of federal disclosure requirements applicable to state entities. Cf. *Printz*, 521 U.S. at 918 (distinguishing that situation); *id.* at 936 (O'Connor, J., concurring) (same).

[9] Similarly, as we have noted (Gov't Br. 29-30), it is indisputable that Congress may preempt state law to *bar* a state agency from taking regulatory action, even if the anti-commandeering principle would prevent Congress from *requiring* the States to regulate. Respondents and their amici object that this case does not involve preemption. See Resp. Br. 28; NCSL Br. 16; Ala. Br. 29. We have not argued that the DPPA is a preemption provision; rather, we have pointed out that preemption provides a useful analogy because several of respondents' arguments (such as the argument that Congress cannot legislate with respect to the States unless it also imposes similar regulation on private entities) cannot be squared with this Court's preemption jurisprudence. See Gov't Br. 38-39. Amici Alabama *et al.* also argue (Ala. Br. 29) that, even though some federal preemption clauses may be phrased in terms of precluding state legislatures and administrative bodies from taking action, preemption actually has relevance only for the state judiciary, and has little or no real effect on the operation of state legislatures and administrators. That understanding of preemption is incorrect. Congress has enacted several provisions that preempt even legislative bodies from taking action in a field governed by federal law, see, *e.g.*, 49 U.S.C. 41713(b)(1), and the application to the

d. Respondents also contend (Resp. Br. 14-17) that the DPPA is invalid because it blurs lines of "political accountability" for decisions by state DMVs whether to release information that is covered by the Act. Respondents misapprehend the relevance of the issue of accountability. The Court has made clear that concerns about accountability underlie the prohibition against commandeering state and local governments into regulating private conduct on behalf of the federal government. See *Printz*, 521 U.S. at 926-933; *New York*, 505 U.S. at 182-183. As we have shown, however (pp. 4-7, *supra*), the DPPA results in no such commandeering, and it therefore does not implicate those accountability considerations.

Respondents would expand the inquiry into "accountability" to condemn federal statutes that restrict state activity whether or not they commandeer the State into regulating private conduct. That notion finds no support in this Court's decisions. The Court has never held that political accountability is impermissibly blurred merely because a state or local official's options in carrying out a state program are constrained by federal law. To the contrary, it is frequently the case that state decisionmakers must take account of the substantive requirements of federal law in choosing among various alternatives, yet that fact presents no constitutional difficulty. For example, in *Fry* v. *United States*, 421 U.S. 542 (1975), the Court upheld the application to state employment of federal wage and salary controls, which limited annual

legislative bodies of the preemption clause is hardly surplusage, as amici suggest. See *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989) (*Machinists* preemption directly prohibits city officials from taking particular actions with respect to private employers, thereby conferring a right that employers may vindicate in damages actions under 42 U.S.C. 1983); 493 U.S. at 119 (Kennedy, J., dissenting) (rejecting damages remedy but agreeing that "plaintiffs may vindicate *Machinists* preemption claims by seeking declaratory and equitable relief in the federal district courts").

salary increases for covered employees. If a state employee had asked his employer for a salary increase exceeding the permissible limit under federal law, the state employer would have had to consider, and comply with, the federal rule restricting salary increases. Under respondents' reasoning, however, *Fry* could not have been decided correctly, because a state agency could have been placed in the position of denying a requested wage increase to a state employee, even though it was federal law that prohibited the state agency from increasing salaries above a certain limit.[10]

3. *Congress's Power Is Not Limited To Generally Applicable Laws.*

As we show in our opening brief (at 34-48), the central holding of the court of appeals, that "Congress may *only* subject state governments to generally applicable laws," Pet. App. 15a (emphasis added; internal quotation marks omitted), is inconsistent with the Constitution's plenary

[10] A state agency may also find that its regulatory alternatives are constrained by a preemption provision in a federal statute. For example, the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4(a), 92 Stat. 1708, precludes the States from enacting or enforcing any law related to any price, route, or service of an air carrier. 49 U.S.C. 41713(b)(1). Under the Airline Deregulation Act, a state consumer-protection agency may not take regulatory action against an airline for overcharging passengers, even if passengers request the state agency to take such action. See *Morales* v. *Trans World Airlines*, 504 U.S. 374 (1992). But even though the state agency must decline the passengers' request for regulatory action against the airline, and even though the federal government is ultimately responsible for the fact that the state agency is prevented from doing so, there is no impermissible "blurring" of political accountability in such a situation. Rather, a constitutionally valid preemption provision is simply given its proper effect under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2. Similarly, in *Golden State Transit Corp.*, *supra*, the City of Los Angeles was held liable under 42 U.S.C. 1983 for the failure of city officials to respect limitations imposed by federal law on their licensing activities, with no suggestion of any constitutionally significant blurring of accountability as between the city and federal authorities.

grant of "legislative Power" to Congress, U.S. Const. Art. I, which necessarily includes the authority possessed by legislative bodies generally to tailor their laws with respect to the particular problems they identify (see Gov't Br. 39-45). In addition, the court of appeals' rigid rule finds no support in the constitutional structure of federalism (*id.* at 45-48) or in precedent or logic (*id.* at 34-39). Respondents and their amici make no attempt to answer our arguments based on the Constitution's text and structure, and the efforts they do make to defend the court of appeals' ruling are unavailing.

a. Respondents argue (Resp. Br. 25-26) that generally applicable laws do not present the danger of blurring of political accountability present in *New York* and *Printz* because, "[w]hen the States are subjected to statutes which apply generally, such statutes apply so broadly that they are unlikely to be mistaken for governmental policy choices by the States." We agree that generally applicable laws do not blur political accountability, but the same point is also true of statutes like the DPPA that directly regulate only state activity directly and do not commandeer state officers into enforcing federal law against private parties. As Judge Phillips observed in dissent below, generally applicable laws are constitutionally permissible because "they directly regulate[] state activities rather than using the States as implements of regulation of third parties." Pet. App. 32a (internal quotation marks omitted). It is only in the latter circumstance that an impermissible blurring of political accountability occurs under the Court's cases. See *New York*, 505 U.S. at 168 ("By contrast, where the Federal Government *compels [the] States to regulate*, the accountability of both state and federal officials is diminished.") (emphasis added); pp. 6-7, *supra*. When the federal government itself directly regulates the activities of state entities in commerce, responsibility for the regulation clearly lies with the federal government.

b. Amici Alabama *et al.* urge the Court to reconceptualize its entire Tenth Amendment jurisprudence. See Ala. Br. 9-10. They argue that the Court should abandon its emphasis in *New York* and *Printz* on impermissible "commandeering" of state and local governments, and instead should distinguish principally between laws of general applicability that include States among the regulated entities, and laws that do not apply to private parties and States in the same way. That emphasis on general applicability is appropriate, amici argue, because laws that "target" States for a "unique burden" should be held invalid under a "process-oriented" approach to the Tenth Amendment that examines whether Congress has "singled out" the States. *Ibid.*

There is no support in this Court's jurisprudence for the proposition that laws that apply only to state entities, or apply to state entities differently than they apply to private entities, are invalid because they target the States as politically powerless entities. Amici seek to enlist *Garcia* and *Baker* for their position (see Ala. Br. 4-16), but their argument turns those decisions upside down. In *Garcia*, the Court emphasized that the States retain considerable influence in the federal legislative structure established by the Constitution, especially through their representation in the Senate. The Court explained that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself," and that "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." 469 U.S. at 550-551.[11] The

[11] The Court observed in *Garcia* that "Madison placed particular reliance on the equal representation of the States in the Senate, which he saw as 'at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty.'" 469 U.S. at 551-552 (quoting The Federalist No. 62, at 408 (James Madison) (B. Wright ed. 1961)). The Court concluded:

Court in *Garcia* therefore abandoned the framework of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and instead emphasized the workings of the political process to safeguard state interests in the federal system. "State sovereign interests * * * are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia*, 469 U.S. at 552.

To be sure, the Court observed in *Baker* that "*Garcia* left open the possibility that some *extraordinary defects* in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment." 485 U.S. at 512 (emphasis added). Neither *Garcia* nor *Baker* suggested, however, that the mere fact that a federal regulatory statute might apply only to a particular kind of state activity, or might apply to state activities differently than similar regulation applied to private activities, would be evidence of an "extraordinary defect[]" in the federal legislative process. When the Court in *Baker* adverted to "extraordinary defects," it was referring to a situation in which a *particular* State might have been deprived of its opportunity to participate in the process of framing federal legislation. Thus, the Court in *Baker* noted that "South Carolina ha[d] not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* at 513.

It strains credulity to suggest that a federal statute's applicability to *all* States of the Union demonstrates that the States have been reduced to a position of political powerlessness. As the Court pointed out in *Garcia*, the States have

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"In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." 469 U.S. at 552.

substantial influence in the federal government. If South Carolina, or any of the other 49 States of the Union, perceived that the proposal to enact the DPPA threatened to impinge on state prerogatives, its officials were free to make their objections known to the Congress. And if many States had perceived that the DPPA was adverse to their legitimate interests, it is doubtful that the DPPA would have been enacted. But far from impairing the States' governmental interests, the DPPA is particularly respectful of those interests; as we have explained (Gov't Br. 32-33), the DPPA poses no obstacle to the use of personal information in DMV records by state agencies. See 18 U.S.C. 2721(b)(1) and (4). It is therefore unsurprising that a representative of the American Association of Motor Vehicle Administrators appeared before Congress in support of the DPPA. See 1994 WL 212696 (Feb. 4, 1994) (statement of Marshall Rickert, Motor Vehicle Administrator for the State of Maryland).

Amici's attempt to analogize this case to one in which the government targets a particular member of the press or a minority religion for adverse treatment (see Ala. Br. 13-14) is therefore unpersuasive.[12] Similarly, in light of the Court's emphasis in *Garcia* on the States' substantial influence in the federal system, the 50 States of the Union cannot reasonably be likened to a discrete and insular minority that lacks politi-

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[12] Even on its own terms, amici's analogy to the Court's First Amendment cases fails. In *Leathers* v. *Medlock*, 499 U.S. 439 (1991), the Court explained that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, *particular* ideas." *Id.* at 453 (emphasis added); see also *id.* at 446 (observing that "selective taxation of the press through the narrow targeting of individual members offends the First Amendment"). The DPPA, however, does not target or single out any *particular* State for unequal treatment. For the same reason, the DPPA is unlike the ordinance invalidated in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), which targeted a *particular* unpopular minority religion for hostile treatment.

cal influence. Cf. *Baker*, 485 U.S. at 513 (citing *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), when referring to the possibility of an extraordinary defect in the national political structure leaving a particular State isolated and powerless). The 50 States of the Union are not a vulnerable political constituency that needs judicial protection against discrimination.

Amici's argument is particularly implausible as applied to the DPPA, for the DPPA is one of several federal statutes that regulate the disclosure of personal information by private and governmental entities. The statute books "teem with laws regulating the disclosure of information from databases." *Travis* v. *Reno*, 163 F.3d 1000, 1005 (7th Cir. 1998), petition for cert. pending, No. 98-1811; see also Gov't Br. 20-21, 39-41. Many of these other federal statutes, applicable to private entities, "adopt record-keeping and information-disclosure criteria at least as complex, and impose a burden at least as great, as the [DPPA]." 163 F.3d at 1005.[13] Thus, even though the other federal statutes do not apply to private databases in exactly the same way that the DPPA applies to the records of state agencies, nonetheless the States have not been "singled out" for burdensome treatment.

Amici Alabama *et al.* contend (Ala. Br. 14) that Congress may not restrict disclosures from DMV records unless it places *identical* restrictions on the disclosure of the same information by all private entities. Congress, however, permissibly concluded that the dangers posed by the dissemination of motor vehicle records differ from the dangers posed by the dissemination of video store and credit bureau records, and tailored its legislative responses accordingly. Disclosures of personal information in DMV records

[13] Indeed, Wisconsin—which has joined Alabama's amicus brief before this Court—"disclaimed any contention that Wisconsin's burden exceeds the travail of banks or other entities regulated by statutory equivalents" to the DPPA. *Travis*, 163 F.3d at 1005.

are particularly problematic because forgoing a driver's license is not a realistic option for most individuals.[14] Motor vehicle records also raise unique privacy concerns because the license plate number, which must be displayed to the public, can be made the key to the driver's identity and home address. In effect, absent the DPPA, every vehicle owner would be required to provide every stranger with the key to his personal information. As Representative Moran, one of the DPPA's sponsors, explained: "The key difference between DMV records and other public records comes from the license plate, through which every vehicle on the public highways can be linked to a specific individual." 140 Cong. Rec. H2523 (daily ed. Apr. 20, 1994).

In addition, as the American Association of Motor Vehicle Administrators informed Congress, "driver and motor vehicle records maintained by one state can be accessed from practically anywhere using only a computer modem." 1994 WL 212696 (Feb. 4, 1994). Other records systems (both private and governmental), such as personnel files and medical records, are not necessarily so readily accessible to the public. Thus, even if information similar to that held in DMV records, such as an individual's name, home address, and social security number, may be kept in other records systems, the danger of disclosure from those records systems is not necessarily so great as the danger of disclosure from DMV records. As Rep. Moran observed, "[a]nyone with access to data linking license plates with vehicle ownership has the ability to ascertain the name and address of the

[14] See 1994 WL 212834 (Feb. 3, 1994) (statement of Prof. Mary J. Culnan, Georgetown University) ("Few people can survive without a driver[']s license or an automobile, and a condition of having either is to register with the state. * * * This is in direct contrast to most of the other mailing lists based on private sector data, such as a list of subscribers to a particular magazine."); *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977) (driving an automobile is "a virtual necessity for most Americans").

person who owns that vehicle. Other public records are not vulnerable to abuse in the same way." 140 Cong. Rec. H2523 (daily ed. Apr. 20, 1994).

Congress therefore had a legitimate basis for addressing in one tailored statute the privacy concerns raised by dissemination of personal information from DMV records, rather than attempting to address all privacy concerns raised by all disclosures of information from all private and public databases, as Alabama apparently would require that it do. Although respondents and their amici disagree with that legislative judgment, "nothing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation." *Baker*, 485 U.S. at 513. There is no reason for the Court to depart from its usual practice of giving Congress wide latitude in setting its legislative priorities and selecting its legislative means. See *Williamson* v. *Lee Optical Inc.*, 348 U.S. 483, 489 (1955). To the contrary, the special protections that the States enjoy in the political process make such deference particularly appropriate in this context.

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For the foregoing reasons, and for those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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